IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
No. 81-2708 Dated June 29, 1982

ORDER

This is an appeal from the district court's dismissal of the plaintiff's complaint because of lack of personal jurisdiction over the defendants. For the reasons stated below, we affirm that judgment.

I.

The plaintiff, Frederick A. Wein, is an Illinois attorney who in July 1980 took but failed the attorney's examination for admission to the State Bar of California.1/ On March 10, 1981, he filed this action in the Northern District of Illinois in an attempt to challenge the legality of the grading of that examination. Summons were served on the defendants in California by

1/ California makes available two methods for gaining admission to the practice of law: (1) an "attorney's examination," consisting primarily of essay questions, which may be taken by persons admitted to practice in other jurisdictions; and (2) a "general examination," consisting of both essay and Multistate Bar Examination sections, which is available to all qualified applicants.

a federal marshal. On May 13, the defendants moved to dismiss the action, arguing that the court lacked personal jurisdiction over them, and that the plaintiff's complaint was deficient in form. In response, the district court entered an order in which it: (1) dismissed the plaintiff's complaint for failure to comply with Fed. R. Civ.P. 8,9,10, and 23;2/ (2) reserved ruling on the defendants' jurisdictional objection, granting the plaintiff 20 days to file an amended complaint; and (3) stayed all discovery.3/

On May 29, the plaintiff filed an amended pleading. In it he alleged that the defendants maintain an artificially low passing rate for the attorney's

2/ The plaintiff attempted to frame his suit as a class action.

3/ Following the defendant's motion, the plaintiff had served them interrogatories inquiring into their relationship with the state of Illinois.

examination in order to restrict the number of attorneys practicing in California and to force persons to retake the examination. He urged that these allegations grounded causes of action under the federal antitrust laws, constitutional and statutory civil rights provisions, and state contract and tort law. In addition, he asserted that personal jurisdiction over the defendants was established under Fed.R.Civ.P. 4(e) and Illinois' long-arm statute, Ill. Rev. Stat. ch. 110, pars. 16,17, and 18.

On July 27, 1981, the court, renewing its consideration of the defendants' prior objection, entered an order dismissing the action for lack of personal jurisdiction. The plaintiff moved to amend the order under Fed. R. Civ. P. 59, requesting the court to transfer the case to an appropriate district under 28 U.S.C. § 1406(a). The court denied that motion. This appeal follows.

II.

The plaintiff raises three relevant claims before this court: (1) that the district court erred by dismissing this action for lack of personal jurisdiction over the defendants; (2) that the court erred by denying him an opportunity to pursue discovery concerning certain contacts between the defendants and the forum state; and (3) that the court abused its discretion by refusing to transfer this case to an appropriate district under 28 U.S.C. § 1406(a). 4/ We consider these in turn.

A. Personal Jurisdiction

The plaintiff argues that jurisdiction over the defendants was established under Illinois' long-arm statute, applicable to this federal suit by virtue of Fed. R. Civ. P. 4(e). 5/ Because that statute "reflect[s]

4/ Because this appeal is from a dismissal for lack of personal jurisdiction, the remaining issues raised in plaintiff's brief, e.g., subject matter jurisdiction, sufficiency of his claims, etc., are not properly before this court.

a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause," Fisons Limited v. United States, 458 F.2d 1241, 1250 (7th Cir.), cert. denied, 405 U.S. 1041 (1972), see Nelson v. Miller, 11 Ill. 2d 378, 143 N.E. 673 (1957), an evaluation of the plaintiff's attempt to utilize it in this context must be guided by the "due process" standards articulated by the Supreme Court in International Shoe Co. v. Washington, 326 U.S. 310 (1945) and its progeny.6/

5/ Although the plaintiff incorporated an antitrust claim in his complaint, at oral argument he expressly disavowed any reliance on the nationwide service provision of the Clayton Act, 15 U.S.C.§22, as a means for establishing personal jurisdiction over the defendants. Thus we limit our discussion to the state long-arm statute. See Advisory Committee Notes to Fed. R. Civ. P. 4(e) ("If the circumstances of a particular case satisfy the applicable Federal law . . . and the applicable State law. . . , the party seeking to make the service may proceed under the Federal or the State law, at his option.").

6/ Although the Supreme Court's major pronouncements in this area have all arisen in the context of assertions of power by state courts, i.e. McGee

The fundamental teaching in this area is that:

> due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id. at 316. The focus for measuring those factors is the "relationship among the defendant, the forum, and the litigation." Shaffer v. Heitner, 433 U.S. 186, 204 (1977).

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v. International Life Ins.Co., 355 U.S. 220 (1957); Hanson v. Denckla, 357 U.S. 235 (1958); Shaffer v. Heitner, 433 U.S. 186 (1977); Kulko v. Superior Court of California, 436 U.S. 84 (1978); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), we have applied an International Shoe analysis in both diversity cases, see e.g. Biltmoor Moving and Storage Co. v. Shell Oil Co., 606 F2d 202,206 (7th Cir. 1979); Hutter Northern Trust v. Door County Chamber of Commerce, 403 F.2d 481, 484 (7th Cir. 1968), and federal question cases, see Illinois v. City of Milwaukee, 599 F.2d 151, 156 n.3 (7th Cir. 1979),vacated on other grounds,451 U.S. 304 (1981); Honeywell v. Metz Apparatewerke, 509 F.2d 1137, 1143 (7th Cir. 1975) when a state long-arm statute was used as the means for effecting service of process. Recently, in his concurring opinion in Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, 50 U.S.L.W. 4553 (U.S. June 1, 1982), Justice Powell suggested that such an approach is proper. See id. at 4558 (When a

Based on that relationship, we must determine "whether the 'quality and nature' of the defendant[s'] activity is such that it is 'reasonable' and'fair'" to require them to defend against the plaintiff's charges in the Northern District of Illinois. Kulko v. Superior Court of California, 436 U.S. 84,92 (1978). That determination necessarily depends upon the particular factual contours of this case. Id.

The plaintiff alleges a variety of "contacts" between the defendants and the state of Illinois. Essentially these fall into three categories: (1) the interaction of the defendants with Illinois residents who apply for admission to the California bar (this includes exchanges of information between the parties; submissions of forms, fees, and certifications of education by Illinois residents; notification of test

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federal district court depends on the law of a state to establish personal jurisdiction, "its jurisdiction . . . normally would be subject to the same due process limitations as a state court.").

results; and provision of further application forms for Illinois residents who fail an examination); (2) the defendant's use in certain circumstances of the results of Multistate Bar Examinations taken in Illinois, 7/ and (3) the fact that there are members of the State Bar of California who reside in Illinois and who receive the association's publications there.8/

7/ The defendants allow applicants for the "general examination" to transfer their scores from recent MBE's taken in other jurisdictions rather than requiring them to retake the examination.

8/ Prior to oral argument, the plaintiff filed a "Motion to Supplement the Record on Appeal, and Motion to Compel Discovery from Defendant or in the Alternative to Compel Discovery by Subpoena to Third Parties," in which he alleged two additional "contacts": (1) that California bar examiners attend a National Conference of Bar Examiner's seminar held in Chicago every two years; and (2) that the State Bar of California obtains information on the character and fitness of out-of-state applicants from the National Conference of Bar Examiners, which is headquartered in Chicago. The defendants did not respond to this motion. At argument, we indicated that we would consider this motion with the case. We now grant the motion to supplement to the extent that we consider the plaintiff's additional allegations. We deny the discovery requests.

An essential criterion for establishing the reasonableness of subjecting a non-resident defendant to litigation is "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235 (1958); see Kulko v. Superior Court of California, 436 U.S. at 96; Lakeside Bridge & Steel v. Mountain State Construction, 597 F.2d 596, 600-01 (7th Cir. 1979), cert. denied, 445 U.S. 907 (1980). The"contacts" alleged by the plaintiff do not satisfy this requirement. Although they illustrate some factual connection between the defendants and Illinois residents, they do not demonstrate any purposeful activity through which the defendants have availed themselves of the "benefits of conducting business in the forum."9/

This conclusion is consistant with that reached by the Fifth Circuit in Burstein v. State Bar of California, 659 F.2d 670 (5th Cir. 1981), withdrawn pending rehearing, 668 F.2d 795(1982), a case similar to ours, in which an individual who took but failed the California bar examination attempted to sue the State Bar of California in the Eastern District of Louisiana.10/ In Burstein the plaintiff focused on (1) the interaction of the defendant with Louisiana residents who

9/ We note in his reply brief the plaintiff, characterizing the defendants as a "state agency," also attempts to rely on more general contacts between the state of California and the state of Illinois as the basis for the court's jurisdiction. (Reply Brief at 2-3.) We reject this argument. The State Bar of California is a public corporation. Cal. Const. art. VI,§9; Cal. Bus. & Prof. Code §6001. (The Committee of Bar Examiners in turn is established by the board of the State Bar. Cal. Bus. & Prof. Code §6046.) The State Bar, as an entity is expressly amenable to suit. Cal. Bus. & Prof. Code §6001. Clearly that entity--not the state--is the focus of the plaintiff's allegations. Accordingly, the plaintiff must demonstrate that the entity which it can and is attempting to sue has "minimum contacts" with the forum.

10/ Although the original panel opinion in this case has been withdrawn, we believe that the "minimum contacts" analysis of the facts of that case was sound.

apply for admission to the California bar and (2) the fact that some California bar members residen in Louisiana as the relevant "contacts." The court concluded that these were not sufficient "affiliating circumstances" to ground personal jurisdiction, noting:

> The State Bar of California does not avail itself of any Louisiana privileges or services. It does not solicit potential members in this or any state. Those who wish to sit for its examination take it upon themselves to apply to do so, and the State Bar, as a convenience to such persons, mails the necessary materials to the address given by these applicants. Similarly, the State Bar mails certain materials to members regardless of their place of residence rather than attempting to require that all its members maintain California mailing addresses.

Id. at 674 (quoting Burstein v. State Bar of California, 503 F. Supp. 227,229(E.D.La. 1980). This assessment is equally applicable to the case before us. To the extent that there is any relationship between the present defendants and the state of Illinois, it is generated by the "unilateral activity"

of persons who happen to be Illinois residents. Such activity cannot "satisfy the requirement of contact" constitutionally required to sustain personal jurisdiction. Hanson v. Denckla, 357 U.S. at 253; see Jadair, Inc. v. Walt Keeler Co.,No. 81-1380, slip op. at 6-7 (7th Cir. May 26, 1982).11/

11/ We recognize that Burstein did not involve an allegation that the defendant used results of MBE's administered in the forum state. Yet we do not find Wein's assertion to that effect sufficient to bridge the gap between the defendants and the State of Illinois. California's use of such examination results is contingent upon the unilateral act of an applicant in submitting his scores. Further, this practice has no effect on the applicant's standing or the defendant's activities in the forum. Finally, we note that Wein himself did not utilize this procedure nor are his substantive allegations in any way tied to the MBE.

We also do not find that plaintiffs belated allegations that California bar examiners attend meetings in Chicago and that the defendants have some dealings with the Chicago-based National Conference of Bar Examiners to be sufficient to satisfy this requirement. This type of sporadic and fortuitous interaction does not implicate the defendants, in any significant way, in activity that is subject to the "benefits and protections" of the laws of the forum state. See Turner v. Jack Tar Grand Bahama, Ltd., 353 F2d 954 (5th Cir. 1965).

The plaintiff resists this conclusion by relying on a number of cases in which personal jurisdiction has been successfully asserted over a nonresident defendant. E.g., Great Western United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), rev'd sub nom. Leroy v. Great Western United Corp., 443 U.S. 173 (1979); Product Promotions, Inc. v. Cousteau, 495 F2d 483 (5th Cir. 1974); Fisons Limited v. United States, supra; Electro-Craft Corp. v. Maxwell Electronics Corp., 417 F2d 365 (8th Cir. 1969). These cases, however, are inapposite. In each of them the defendant either exerted significant control on business in the forum state (Fisons), produced substantial effects on business in the forum (Great Western), or reasonably anticipated that a contract to which it was party would have direct consequences in the forum (Cousteau, Electro-Craft). Each of these defendants had some articulable stake in

the laws of the forum for enforcement or protection.

In the present case there is no such connection. The defendants have not purposely availed themselves of any privileges of the forum state. Moreover, that state has no significant interest in adjudicating this dispute. See McGee v. International Life Ins. Co., 355 U.S. 220 (1957). Thus "basic considerations of fairness" disctate that the defendants could not "reasonably have anticipated being 'haled before [an Illinois] court.'" Kulko v. Superior Court of California, 436 U.S. at 97-98 (citation omitted); see World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286,297 (1980); Burstein v. State Bar of California, 659 F.2d at 675. The limits of due process would have been transgressed had the court attempted to exert power over the defendants by means of Illinois' long-arm statute.

Thus, the court's rejection of this jurisdictional base was proper.

B. Discovery

Apart from his substantive jurisdictional argument, Wein also contends that the district court erred by dismissing his action without permitting him to pursue discovery concerning certain contacts between the defendants and the state of Illinois.12/

Although discovery concerning factual issues raised by a motion to dismiss for lack of personal jurisdiction may be appro-

12/ As explained by the district court, Wein sought information on:

> 1) all income derived by defendant in any way from the state of Illinois, including but not limited to application fee[s] from Illinois residents; 2) the number of applicants for the California Bar exam who have utilized multistate (MBE) scores from examinations taken in Illinois, both at the time Wein took the test and for the past ten years; 3) all communications between the Bar and California Bar members who are Illinois residents; [and] 4) all trips or communications sent to or received from Illinois for the past five years by any member of the California bar which [sic] was connected with the State Bar.

priate in certain cases, a district court is vested with broad discretion in controlling such inquires. Chrysler Corp. v. Feders Corp., 643 F2d 1229, 1240 (6th Cir), cert. denied, 102 S.Ct. 388 (1981); Budde v. Ling-Temco Vought, Inc., 511 F.2d 1033, 1035 (10th Cir. 1975). "A ruling by the trial court. . . denying discovery will not be cause for reversal unless an abuse of discretion is found." Chrysler Corp. v. Fedders Corp., 643 F2d at 1240 (citing H.L. Moore Drug. Exch., Inc. v. Smith, Kline, and French Laboratories, 384 F2d 97 (2d Cir. 1967)).

In this case the district court concluded that the information sought by Wein was "only tenuously related to [his] claims, and would not establish voluntary acts by defendants directly or indirectly within Illinois." In effect the court found that the proposed discovery would not be useful to remedy the jurisdictional defect. In

light of our analysis of the question of personal jurisdiction, we find no abuse of discretion in the court's treatment of the plaintiff's request. Id.; see Burstein v. State Bar of California, 659 F2d at 675.

C. Transfer under 28 U.S.C. § 1406

The plaintiff's final argument is that the district court erred by dismissing this case rather than transferring it pursuant to 28 US.C.§1406(a) to a district "in which it could have been brought." Although section 1406(a) is "broad enough to authorize the transfer of [a case],. . . whether the court in which it was filed had personal jurisdiction over the defendants or not," Goldlawr, Inc. v. Heiman, 369 U.S. 463,466 (1962), such a transfer must be "in the interest of justice." A district court has broad discretion to decide if that criterion is met. Brown v. Grimm,624 F.2d 58 (7th Cir. 1980); De La Fuente v. I.C.C., 451 F. Supp. 867, 872 (N.D.Ill. 1978).

In this case the district court refused to authorize a transfer because: (1) the plaintiff did not affirmately show that he was barred from refiling his complaint in a proper forum; (2) the action was not substantially advanced prior to dismissal; and (3) the plaintiff never identified which district should receive the case. Based on these factors, the court acted within its discretion in denying the plaintiff's request. See Brown v. Grimm, supra; Lowery v. Estelle, 533 F.2d 265 (5th Cir. 1976) (dismissal does not bar refiling in proper forum).

III.

For the foregoing reasons, the judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
For the Seventh Ciruit

DATED August 5, 1982

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by plaintiff-appellant, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel have voted to deny a rehearing. According,

IT IS ORDERED that the aforesid petition for rehearing be, and the same is hereby, DENIED.

Unpublished Per Curiam Order

JUDGMENT-ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit

June 29, 1982

No. 81-2708

U.S.D.C. 81-C-1312

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered on this date.

United States District Court
Northern District of Illinois
Eastern Division

Civil Action No. 81 C 1312

Dated July 23, 1981

MEMORANDUM AND ORDER

This cause is before the court on defendants' motion to dismiss plaintiff's second amended complaint. For the reasons hereinafter stated, the motion will be granted.

Background

Frederick A. Wein is an attorney licensed to practice law in the state of Illinois. In April, 1980, Wein filed an application for admission to the State Bar of California. As part of the application process, in July 1980, Wein took the attorneys examination required for admission.[1] In

[1] California, like many states, has two alternative methods of gaining admission to the practice of law. Persons who are admitted in other jurisdictions may qualify to take the "attorneys examination" which primarily consists of essay questions. Other qualified applicants take the general examination, which consists of both an essay and multistate section. The multistate section (MBE) is that approved by the National Conference of Bar Examiners, and is in use

December, 1980, Wein was notified that he had failed to pass the examination.[2] The notice also contained information on the requirements, applications and fees for re-taking the examination at a later time, as well as information concerning available review procedures.

Wein filed this action on March 10, 1981. The complaint listed eleven "causes of action," which were described in highly conclusory languages, i.e., "Count I. Breach of contract." On March 17, 1981, Wein filed an amended complaint which also contained similarly described "causes of action." On May 12, 1981, this court granted Defendants' motion to dismiss the amended complaint for failure to comply with Rule 8,9,10, and 23

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in many states. Under the California rules, a qualified attorney applicant may chose to take either the general or the attorney examination.

2 Wein's application apparently gave his address as China Lake, California. Shortly after the examination, he requested his grades be mailed to his home in Wilmette, Illinois.

of the Federal Rules of Civil Procedure.[3] The original motions to dismiss raised several jurisdictional objections to the complaint. The court reserved ruling on these until such time as plaintiff filed a proper amended complaint. On may 29, 1981, plaintiff filed his second amended complaint. Although this complaint is seriously deficient in form, it appears adequate to resolve the jurisdictional objections at this time. Therefore, pursuant to the earlier order, the court has now considered the previously raised jurisdictional objections on the basis of the previously filed memoranda.

Allegations of the Complaint

Wein asserts that personal and subject matter jurisdiction exists by virtue of 15 U.S.C. §4; 28 U.S.C. §§1331, 1332, 1337,

3 The original and amended complaint contained some allegations which appeared to allege class action status would be proper. Not until the second amended complaint was filed was it clear that Wein was attempting to bring a class action.

1343, Federal Rule of Civil Procedure 4(e); Ill. Rev. Stat. Ch. 110, §§16, 17,18, and ancillary and pendant jurisdiction. The complaint contains causes of action briefly summarized as follows: Violation of the antitrust laws (Count 1); Civil Rights violations under 42 U.S.C. § 1983 and § 1985 (Count 2 and 3); Violation of plaintiff's right under the equal protection clause, the due process, and privilege and immunities clauses of the United States Constitution (Counts 4,5, and 6; Unjust enrichment, intentional infliction of emotional distress, misrepresentation, fraud, and breach of contract (Counts 7 through 12).

Despite this profusion of claims, Wein's contentions contain a common basis. Wein contends that the State Bar maintains an artificially low passing rate for the California's attorneys examination. He claims the State Bar uses this artificial method to restrict the numbers of attorneys practicing

in California, and to enrich itself through fees for persons compelled to retake the examination. He claims that although the Bar claims that there are 100 possible points on the essay portion of the exam, as a practical matter, it is impossible to achieve more than 70, the official passing score, on any single answer.

Personal Jurisdiction

Defendants contend that personal jurisdiction cannot constitutionally be asserted by this court. Wein contends that personal jurisdiction over these nonresident defendants is proper under the Illinois long-arm statute Ill. Rev.Stat. Ch. 110, 17, applicable by virtue of Rule 4(e) Fed.R.Civ.Pro.

Illinois courts have interpreted this statute to permit exercise of personal jurisdiction over nonresident defendants to the fullest extent permitted by the dur process clause. Nelson v. Miller, 11 Ill.2d 378 (1957). The question is therefore twofold.

First, plaintiff must present a prima facie case that this action is covered by the terms of the statute. Second, plaintiff must show that exercise of personal jurisdiction in this instance would not offend the due process clause of the United States Constitution.

Section 17(1) permits exercise of personal jurisdiction over nonresidents who perform certain actions within Illinois. Subsection (a) refers to actions arising from the "transactions of any business within the state." Wein contends that the acceptance of his application from Illinois, and the acceptance of fees from Illinois are sufficient contacts. It would be a strained interpretation that acceptance of an unsolicited application for admission, or the accompanying fee by mail would be considered the transaction of business. See Moity v. Louisiana State Bar Ass'n, 414 F.Supp. 176 (E.D.La. 1976). It is also a strained inter-

pretation to state that Wein's contention that the tests were unfairly graded is a "cause of action arising from" this "transaction of business," as required by Section 17(3). See Process Church of Final Judgment v. Sanders, 338 F.Supp. 1396 (N.D.Ill. 1972); Wiedemann v. Cunard Line Ltd., 63 Ill.App. 3d 1023, 20 Ill.Dec.723 (1st Dis., 1978).

The contention that Section 17(1)(b), commission of a tortious act, would support jurisdiction of this case is similarly flawed.

It is clear that the "contacts" upon which Wein relies bear little or no relation to the basis of his complaint. Wein's contentions revolve around the grading of the essay portion of the bar exam. Wein is not challenging the fairness of the multistate examination, nor is his complaint related to communications between the Bar and Illinois residents who happen to be members of the California Bar. California accepts applicants for admission from the entire United States,

and several foreign countries. The Bar imposes uniform fees upon all similarly situated applicants. Wein's contention that the mere acceptance of the application and accompanying fee allows assertion of jurisdiction over these defendants would result in the imposition of jurisdiction over these defendants in all these locations. Therefore, Wein's allegations do not meet the standard set forth in Section 17(3) for assertion of personal jurisdiction.

However, the primary question is whether assertion of personal jurisdiction over these defendants would be consistent with the due process clause. Assertion of personal jurisdiction over nonresident defendant requires that the nonresident have sufficient "minimum contacts" with the forum so that requiring the nonresident to appear and defend does not violate "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326

U.S. 310,316 (1954). The primary concern is whether the nonresident's conduct and connections with the forum are such that he should reasonably anticipate being hailed into court there. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286,297 (1980); Kulko v. California Superior Court, 436 U.S. 84, 97-8 (1978); Hanson v. Deckla, 357 U.S. 235 (1958); Lakeside Bridge & Steel v. Mountain State Construction Co., 597 F.2d 596 (7th Cir., 1979).

The Supreme Court has noted "the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state" Hanson v. Deckla, supra at 253. In this action, it is undisputed that defendants neither performed any action in Illinois, or requested that plaintiffs take any action in Illinois. In Lakeside Bridge & Steel, supra, a Wisconsin corporation solicited and received a subcontract

for goods to be delivered to defendant in West Virginia. Defendant did not send any officers into Wisconsin for the contract, but corresponded with the Wisconsin plaintiff by mail and telephone. The Seventh Circuit Court of Appeals found performance of the contract by plaintiff, not defendant, within the forum was not sufficient particularly where the contract does not specify the place of performance. Lakeside, supra at 601.

In a very similar action, the District Court for the Eastern District of Louisiana found it lacked personal jurisdiction under the Louisiana long-arm statute. Burstein v. State Bar of California, 503 F.Supp. 227 (E.D.La. 1980). In that case a Lousiana resident sued defendants herein based on the alleged unfairness of the grading of the California Bar. The District Court found that only plaintiff's unilateral actions connected the complaint to the state of

Louisiana. Similarly, in this action, the unilateral choice of the resident plaintiff, Wein, does not justify assertion of jurisdiction over these nonresident defendants.

Wein contends it is inappropriate to dismiss his complaint without allowing him discovery to show additional contacts between defendants and the state of Illinois. The discovery Wein contends is necessary seeks information on 1) all income derived by defendant in any way from the state of Illinois, including but not limited to application fee from Illinois residents; 2) the number of applicants for the California Bar exam who have utilized multistate (MBE) scores from examinations taken in Illinois, both at the time Wein took the test and for the past ten years; 3) all communications between the Bar and California Bar members who are Illinois residents; 4) all trips or communications sent to or received from Illinois for the past five years by any

member of the California Bar which was connected with the State Bar. We cannot agree that the answers to these interrogatories would strengthen Wein's claims against the State Bar. The Discovery requests are only tenuously related to Wein's claims, and would not establish voluntary acts by defendants directly or indirectly within Illinois. Therefore, no additional discovery is needed.

Motion for Default.

On May 12, 1981, when the court dismissed Wein's first amended complaint, the court granted Wein twenty days to file a proper complaint. At the same time, in response to an inquiry from counsel for defendants, the court directed that no answer to such amended complaint need be filed until after the pending motions to dismiss were determined. Disregarding this instruction, Wein has filed a motion for default based on defendants' failure to answer the complaint. The motion ignores this court's

previous instructions to the parties, and shall be denied.

Other Grounds for Dismissal

Defendants motion raise several alternative objections and grounds for dismissal of this action. Because of this court's determination that personal jurisdiction is lacking, it is unnecessary and possibly improper to address the remaining issues. Therefore, we reject plaintiff's invitation to rule on all the grounds presented by defendants.

Conclusion

For the reasons stated, the motions of defendants Committee of Bar Examiners of the State of California, and the State Bar of California to dismiss this complaint for lack of personal jurisdiction shall be, and the same is hereby, granted.

EDWIN ROBSON
Senior Judge

Dated: J8ly 23, 1981

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 81 C 1312
Dated September 15, 1981

MEMORANDUM AND ORDER

This cause is before the court on plaintiff's motion for reconsideration of the July 27, 1981, order dismissing the second amended complaint in this cause. For the reasons hereinafter stated, the motion will be denied.

The complaint was dismissed for lack of personal jurisdiction over these non-resident defendants. Plaintiff's motion for reconsideration complains of issues addressed in the original motion, or matters irrelevant to the determination of the question as outlined in the July 27, 1981, order. Plaintiff further contends the "interests of justice" require transfer rather than dismissal because the statute of limitations might run during a possible appeal.

Because plaintiff neither affirmately states the statute of limitations has run at this time, and because the action was not substantially advanced prior to dismissal, the court will decline to revise the order to transfer the action. Further, plaintiff does not identify which court in California should receive the case, merely stating it should be transferred to a court "where personal jurisdiction can be obtained over the defendant."

Therefore, for the reasons stated, the motion for reconsideration shall be and the same is hereby denied.

EDWIN ROBSON
Senior Judge

Dated: September 15, 1981

United States District Court
Northern District of Illinois
Eastern Division

Case No. 81 C 1312
Dated May 12, 1981

STATUS

STATUS HEARING HELD. Defendants' counsel granted leave to appear and represent defendant pursuant to GENERAL RULE 6(b). On motion of defendants, the amended complaint shall be and the same is hereby dismissed for failure to comply with RULES 8,9,10, and 23 of the FEDERAL RULES OF CIVIL PROCEDURE. PLAINTIFF IS DIRECTED to file a proper amended complaint within twenty (20) days, at which time the court will consider the jurisdictional arguments of defendants on the basis of briefs on file. Defendants given ten (10) days thereafter to file an answer or otherwise plead to the amended complaint STAY on discovery shall continue in effect. Status hearing and Plaintiff's motion to preserve evidence continued to June 23, 1981 at 11:00 A.M.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 81 C 1312
Filed May 29, 1981

SECOND AMENDED COMPLAINT

The named plaintiff, for himself and all other members of the class hereinafter described now present this second amended complaint and allege as follows:

1. The jurisdiction of this court arises under the Constitution of the United States, in particular the provisions of the Privileges and Immunities clauses of Article 4 and Amendment 14, the Due Process clause of Amendment 5 as applied to the states under Amendment 14, the Equal Protection Clause of Amendment 14, and the laws of the United States and in particular 15 USC 4, 28 USC 1331, 28 USC 1332, 28 USC 1337, 28 USC 1343, as well as Rule 4(e) FRCP, Chapter 110, Illinois Revised Statutes sections 16, 17 and 18, and ancillar and pendant jurisdiction where appropriate. The matter in

controversey exceeds the sum of ten thousand dollars.

2. The named plaintiff is a resident of the Village of Wilmette, State of Illinois.

3. Defendant, State Bar of California, is a public corporation created by statute of the legislature of the State of California, California Business and Professional Code Section 6001, and has offices in the City of San Francisco, in the State of California. Defendant Committee of Bar Examiners is a committee of the State Bar of California established by the Board of Governors of the State Bar pursuant to statute section 6046 Cal. Bus. & Prof. Code, and has offices in the cities of San Francisco and Los Angeles, State of California.

4. This action is brought by plaintiff as a class action, on his own behalf and on behalf of others similarly situated under the provisions of Rules 23(a) and 23(b)(1)(A), 23(b)(1)(B), 23(b)(2) and 23(b)(3) FRCP for

injunctive relief, compensatory damages, punitive damages, threefold damages under 15 USC 15, attorney's fees under 15 USC 15, attorney's fees under 42 USC 1988, and costs.

5. The class so represented by plaintiff in this action of which plaintiff himself is a member consists of all persons having taken the July 1980 California Bar Examination and have not received a passing grade on said bar examination or any other California Bar examination subsequently given.

6. The exact number of members of the class, as hereinabove identified and described is not known but it is estimated at approximately four thousand members. The class is so numerous that joinder of individual members herein is impracticable.

7. There are common questions of law and fact in the action that relate to and affect the rights of each member of the class and the relief sought is common to the en-

tire class, namely the fraudulent grading of the essay portion of the bar exam, an excessively and unreasonably low passing rate on the examination in violation of the Sherman Act, an excessively and unreasonably low passing rate on the examination in order to unjustly derive substantial revenue from repeat takers of the exam at their expense and to their detriment, enticement and entrapment of members of the class to use proceedures to pass the examination which discriminate against said members and virtually insure that such members cannot pass the examination, all of the foregoing being in violation of plaintiff's constitutional and civil rights under Article 4, and Amendments 5 and 14 of the U.S. Constitution, 42 USC 1983, 42 USC 1985, 15 USC 1, as well as breach of contract, fraud, misrepresentation, unjust enrichment and intentional infliction of emotional distress.

8. The claim of plaintiff, who is a

representative of the class herein is typical of the claims of the class, in that all members of the class, including plaintiff, depend on a showing of acts and omissions of defendants giving rise to the right of plaintiffs to the relief sought herein. There is no conflict as to any individual named plaintiff and other members of the class with respect to this action, or with respect to the relief set forth herein.

9. The named plaintiff is a representative party of the class and being an attorney admitted in Illinois is able to and willing to fairly and adequately protect the interests of the class and will actively conduct and be responsible for the members case herein.

10. This action is properly maintained as a class action in that prosecution of seperate actions by individual members of the class would create a risk of varying adjudications with respect to individual

members of the class which would establish incompatable standards of conduct for the defendants herein of whom oppose the class.

11. This action is properly maintained as a class action in that the prosecution of seperate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications, or would substantially impair or impede their ability to protect their interests.

12. This action is properly maintained as a class action inasmuch as the defendants herein, all of whom oppose the class, have acted or refused to act, as hereinafter more specifically alleged, on grounds which are applicable to the class, and have reason for such conduct, make appropriate final injunctive relief as sought in this action.

13. This action is properly maintained as a class action inasmuch as the questions of law and fact common to the members of the class predominate over all questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy in that plaintiff and members of the class all took the same California Bar Examination and were subjected to the same acts by defendants in connection with the administration of said examination as complained of herein.

14. Defendants are by statute of the State of California empowered as the sole agency to conduct bar examinations for determining by such examination which of the applicants for a particular examination are to be admitted to the State Bar of California and licensed to practice law in the State of California.

15. The bar examination is comprised

of a multistate multiple choice portion and an essay portion.

16. It is possible for an applicant to pass the bar examination in one of three ways hereinafter referred to as exam passing proceedures:

(a) An applicant can take both the multistate and essay portions at the same examination session, the scores of the two portions being weighted average of the two portions to determine the applicant's total score. Any applicant, including attorney applicants, can take this procedure and achieve a passing average on the whole exam while not achieving a passing grade on one of the multistate portion or the essay portion.

(b) An applicant, including attorney applicants, can take each of the two portions at different examination sessions, in which case the scores of the two portions are not averaged together and it is necessay for the

applicant to receive a passing average score on each of the multistate portion and the essay portion. This procedure is most often used by out of state applicants and out of state attorneys who have taken the multistate portion of the exam in another jurisdiction within 21 months of taking the California essay portion, in which case the multistate grade can be transferred to and accepted by the California Bar Examiners.

(c) If an applicant is an attorney practicing law four of the past six years in another jurisdiction, this out of state attorney applicant, at his or her election, can elect to take only the essay portion of the exam and must receive an average passing grade on the whole essay portion.

17. It is stated by the Committee of Bar Examiners that a passing grade on each of the essay questions is 70 out of a possible 100 and that the passing average grade on the essay portion is 70 out of a possible

100, the passing grade on the essay portion being the sum of all the grades achieved on all of the individual essay questions and divided by the number of essay questions.

18. Applicants from any state, upon presentation of a prescribed monetary fee and proper credentials including sponsorship by a member of the State Bar of California, can apply to take the California Bar Examination without regard to state citizenship.

19. Plaintiff, Frederick A. Wein, as well as other members of the class, in a good faith belief of fair treatment and equitable grading of the exam, and in detrimental reliance thereon, paid a prescribed monetary fee and presented proper credentials to the California Bar Examiners. Accordingly, plaintiff was admitted to take the July 1980 examination. The activity between the plaintiff and defendants, at the very least, comprising a contract, express or implied of a return promise by defendants that

plaintiffs can take the bar examination and will be equitably treated and the examination fairly graded, and that with such fair grading and equitable treatment, if all other matters are in order, that plaintiffs will be accorded the rights and privileges of all other applicants passing the bar examination, i.e. certification to the Supreme Court of California, and with that Court's approval, membership in the State Bar of California and a license to practice law in the State of California.

20. The named plaintiff, having practiced law four of the past six years in another jurisdiction, elected to take the essay portion only under procedure 16(c). Only out of state attorneys can take this "attorney's exam" but said attorneys can elect to take any of the other passing procedures, 16(a), 16(b) stated above. In all cases, all members of the class, regardless of test passing procedure chosed or used,

must take the essay portion of the examination.

21. Plaintiff and all members of the class took the bar examination in July,1980.

22. In accord with grading procedures, on information and belief, by use of model answers, grading sheets and instructions, and other matters not disclosed to applicants by the bar examiners, the essay portion of the subject bar examination was graded.

23. Plaintiff and members of the class did not achieve a passing grade according to the respective procedure used and accordingly did not sucessfully pass the examination and were refused admission to the State Bar of California and were refused a license to practice law in the State of California.

24. Plaintiff and other members of the class were informed by mail of such failure to pass the subject bar examination and were solicited by such mailing to pay a prescribed monetary fee and to apply to retake the next bar examination given in Feb-

ruary 1981. Such mailing consisted of instruction sheets for applying for the February 1981 examination and an application form to be filled out by applicants. Such notice, on information and belief, intentionally caused emotional distriess to various members of the class.

25. Plaintiff and members of the class, to their detriment, relied upon good faith, fair dealing and equitable grading of the essay portion of the exam which are elements of any contract. However, have conducted the examination such that singly or in combination, it is virtually impossible, if in fact impossible for an applicant to achieve an average passing grade of 70 out of a purported possible grade of 100 in that it is virtually impossible, if in fact impossible to achieve a passing grade of 70 out of a purported possible grade of 100 on any individual essay question, or that discriminatory passing procedures are established to

the detriment of out of state applicants and such out of state applicants are enticed and entrapped into using such passing procedures 16(b) and 16(c) requiring a passing grade on the essay portion such that the achieving of such a passing grade being virtually impossible to achieve, with the artificially low grades on the essay portion reducing the average grade on the whole examination according to procedure 16(a) affecting California residents, such that defendant engages in fraudulent, dishonest, and improper grading of the essay portion of the examination in breach of contract, by fraud, misrepresentation, deception, and false promise in order to restrict and keep down the numbers of applicants passing the examination in violation of 15 USC 1, 42 USC 1983, Article 4 and Amendments 5 and 14 of the U.S. Constitution, as well as breach of contract, fraud, misrepresentation, 42 USC 1985, intentional infliction of emotional distress,

and unjust enrichment.

26. That defendants by means of excessively and unreasonably low passing rate on the examination, typically less than 50% (52% for the July 1980 examination, 34% for the February 1980 examination, by way of example and not be way of limitation) achieved by means stated in paragraph No. 25 above which is expressly incorporated by reference herein, conducts the bar examination in a manner designed to unreasonably restrict and limit the number of applicants admitted to the State Bar of California in order to control the number of attorneys practicing law in the State of California, and singly or in concert with others, unreasonably restrict competition with attorneys previously admitted and practicing law in the State of California affecting interstate commerce in violation of 15 USC 1, 42 USC 1983, 42 USC 1985, Article 4 and Amendments 5 and 14 of the U.S. Constitution, as well as breach of

contract, fraud, misrepresentation, intentional infliction of emotional distress, and unjust enrichment.

28. That defendants conduct the examination by means of excessively and unreasonably low passing rate on the examination achieved by means stated in paragraph No. 25 hereinabove which is expressly incorporated by reference herein, to produce the excessively and unreasonably low passing rate in a capricious and arbitrary manner independent of any rational connection with plaintiff's fitness or capacity to practice law in violation of 15 USC 1, 42 USC 1983, 42 USC 1985, Article 4 and Amendments 5 and 14 of the U.S. Constitution, as well as breach of contract, fraud, misrepresentation, intentional infliction of emotional distress, and unjust enrichment.

29. That the establishing of passing procedures for taking the examinationby out of state attorneys which discriminate against

said out of state attorneys in favor of California residents causing excessively and unreasonably low passing rates chieved by means stated in paragraph No. 25 hereinabove which is expressly incorporated by reference herein, to entice and entrap said out of state attorneys to use said discriminatory procedures 16(b) and 16(c) which by intentional deceit, fraud, false promise and misrepresentation by defendants, mislead such out of state attorneys knowing of such attorneys reliance upon fair marking of the examination and equitable treatment by defendant, and lack of knowledge of such out of state attorneys to the detrimental effects of such proceedures in violation of 42 USC 1983, 42 USC 1985, 15 USC 1, Article 5 and Amendments 5 and 14 of the U.S. Constitution, as well as breach of contract, fraud, misrepresentation, unjust enrichment, and intentional infliction of emotional distress.

30. That defendants knowingly enticed

and entrapped out of state attorneys to take passing procedures 16(b) and 16(c) which are virtually impossible, if in fact impossible, to pass the bar examination because it is virtually impossible, if in fact impossible, to pass the essay portion of the examination by means stated in paragraph No. 25 hereinabove which is expressly incorporated by reference herein, by intentional deceit, fraud, false promise, and misrepresentation by defendants, thereby putting such out of state attorneys at an unfair disadvantage with respect to residents of the State of California in violation of 15 USC 1, 42 USC 1983, 42 USC 1985, Article 4 and Amendments 5 and 14 of the U.S. Constitution, as well as breach of contract, fraud, misrepresentation, intentional infliction of emotional distress, and unjust enrichment.

31. That the alternate passing procedures primarily available to out of state attorneys, i.e. procedures 16(b), 16(c),

which are virtually impossible, if in fact impossible to pass, are designed to discourage and in fact do discourage immigration of out of state attorneys to the State of California in order to restrict competition of such out of state attorneys with attorneys previously admitted within the State of California and practicing law in the State of California affecting interstate commerce in violation of 15 USC 1, 42 USC 1983, 42 USC 1985, Article 4 and Amendments 5 and 14 of the U.S. Constition, as well as breach of contract, faud, misrepresentation, unjust enrichment, and intentional infliction of emotional distress.

COUNT No. 1

Defendants have violated anti-trust laws 15 USC 1 (Sherman Act) as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

COUNT No. 2

Defendants have deprived plaintiffs

of civil rights under 42 USC 1983 as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

COUNT No. 3

Defendants have deprived plaintiffs of civil rights under 42 USC 1985 as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

COUNT No. 4

Defendants have deprived plaintiffs of civil rights under the Equal Protection Clause of Amendment 14 of the U.S. Constitution as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

COUNT No. 5

Defendants have deprived plaintiffs of rights in violation of the Due Process Caluse of Amendment 5 as applied to the states under Amendment 14 of the U.S Constitution as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

COUNT No. 6

Defendants have deprived plaintiffs of rights in violation of the Privileges and Immunities Clause of Amendment 14 of the U.S. Constitution as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

COUNT No. 7

Defendants have deprived plaintiffs of rights in violation of the Privileges and Immunities of Article 4 of the U.S. Constitution as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

COUNT No. 8

Defendants have enriched themselves unjustly at the expense of plaintiffs and to plaintiff's detriment as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

COUNT No. 9

Defendants have intentionally caused

members of the class emotional distress as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

COUNT No. 10

Defendants have misrepresented facts to plaintiffs upon which plaintiffs relied to their detriment as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

COUNT No. 11

Defendants have perpetrated a fraud upon plaintiffs as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

COUNT No. 12

Defendants have breached a contract with plaintiffs as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

WHEREFORE, plaintiff prays, for himself and all other members of the class:

1. That a revised passing grade cri-

teria of 70 percent of a reasonably achievable 100 percent grade be established and determined for the essay portion of the July 1980 California Bar Examination and that it be adjudicated, decreed and ordered that plaintiffs now having passed the essay portion under the revised grading criteria under all test passing procedures established for the examination, that all such applicants be accorded all rights and privileges of all other successful applicants including certification to the Supreme Court of California for admission to the State Bar of California and a license to practice law in the State of California.

2. Unspecified compensatory damages.

3. Unspecified punitive damates.

4. Threefold damages under 15 USC 15.

5. That defendants be permanently enjoined from conducting future bar examinations in the manner complained of herein.

6. Attorney's fees under 15 USC 15

7. Attorneys fees under 42 USC 1988.

8. Costs.

9. Other relief which the court deems just.

Respectfully submitted

Frederick A. Wein
Attorney for plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action 81 C 1312
Filed October 21, 1981

NOTICE OF APPEAL

Notice is hereby given that Frederick A. Wein, individually and as a representative of a class of others similarly situated, plaintiff above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the following orders entered in this civil action:

1. The order entered July 27, 1981.

2. The order entered September 21, 1981 refusing amendment of the order of July 27, 1981.

3. The order entered May 13, 1981 which was denied reconsideration by the order entered July 27, 1981, which in turn was denied amendment by the order entered September 21, 1981.

Respectfully Submitted
Frederick A. Wein

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 81-2708
filed June 3, 1982

MOTION TO SUPPLEMENT THE RECORD ON APPEAL, and MOTION TO COMPEL DISCOVERY FROM DEFENDANT OR IN THE ALTERNATIVE TO COMPEL DISCOVERY BY SUBPOENA TO THIRD PARTIES, with MEMORANDUM IN SUPPORT THEREOF

Named plaintiff hereby moves to be permitted to supplement the record on appeal and, if necessary, that defendant be compelled to provide highly relevant information or that a subpoena issue to third parties for the required information for the reasons shown herein.

The present case was dismissed for lack of in personam jurisdiction in the district court wherein plaintiff was denied all discovery related to jurisdictional issues. See plaintiff's Motion for Reconsideration, filed May 22, 1981, docket No. 32. The refusal of the district court to permit discovery related to jurisdictional matters is, inter alia, brought to this Court

on appeal. See Brief for Appellant, pages 27-29, and page 32, enumerated item No. 4.

Subsequently, events have transpired which further illustrate that defendant has in fact engaged in systematic and continuous transactions of business within the forum state of Illinois which plaintiff, deprived of previous discovery, was unaware of until just recently. It is these systematic and continous transactions of business which plaintiff now brings to the attention of the Court.

Defendant will claim, as in their letter of response dated May 20, 1982 submitted herewith ahd discussed hereinafter, that plaintiff is "a little bit late". However, such lateness is due to defedant's previous objections to reasonable discovery, and plaintiff has only recently become aware of such transactions of business by fortuitous events, the timing of which were not within plaintiff's control. Accordingly,

any purported lateness is excusable and without fault to plaintiff and such purported lateness should not be permitted to be used by defendant as a new excuse to deprive the Court of information it requires in order to reach a just decision.

THE PRESENCE OF BAR EXAMINERS IN ILLINOIS

The first substantial and continous contact discussed is the presence of bar examiners from the State Bar of California within the forum state of Illinois.

In an article appearing in the Chicago Daily Law Bulletin of Monday, May 3, 1982 reported a seminar of bar examiners held April 29 and 30, 1982 at the Westin Hotel (formerly the Continental Plaza Hotel) at 909 North Michigan Avenue, Chicago, Illinois, by the National Conference of Bar Examiners (NCBE) headquartered at 333 North Michigan Avenue, Chicago, Illinois. A copy of said article is submitted as exhibit "A". The newspaper being one of general circulation

in the community, the Court is hereby moved to take judicial notice of said article under Rule 201, Federal Rules of Evidence.

Telephone inquiry to NCBF revealed that there were two or three bar examiners present from the State Bar of California and that this seminar for new bar examiners is held every two years. Understandably, NCBE refuses to document this or provide any further information unless by way of subpoena.

Accordingly, plaintiff wrote defendant on May 17, 1982, requesting that they voluntarily provide such information, said letter being submitted herewith as exhibit "B". Defendant's reply by letter of May 20, 1982, submitted herewith as exhibit "C" was a refusal to provide the requested information and is consistant with defendant's previous resistance to all discovery.

Exhibit "C" is significant for two reasons. Firstly, the thrust of plaintiff's letter requesting documentation that bar

examiners of the State Bar of California have attended the latest seminar and previous seminars given every two years is not denied and is in fact, by reference to the Wailes affidavit affirmed. Accordingly, exhibit "C" stands as an admission by defendants against interest and is admissible as evidence by the Court.

Secondly, exhibit "C" demonstrates that the previously impeached Wailes affidavit is a cleverly written document and intentionally incomplete, which has the effect of misleading the Court into believing that defendant has no contacts with the forum State of Illinois much less minimum contacts and that in so doing, the Wailes affidavit effectively misrepresented the issue before the Court and by its lack of candor is perjurious.

The information requested by plaintiff in exhibit "B" isin the posession of defendant but defendant refuses to divulge said

information. If they have such clean hands, why should they not provide the information? Their refusal to divulge invites the Court to resort to a spoliation inference, ergo, that the information which they refuse to divulge is detrimental to defendant's cause, i.e. that bar examiners from the State Bar of California did attend the seminar held in Chicago, Illinois, April 29 and 30, 1982, and that bar examiners of defendant have systematically and continuously attended similar seminars previously given every two years.

Should the Court choose not to make this inference, it will be necessary for plaintiff to provide the proof and therefore plaintiff appeals to the Court to help acquire said proof. In such an event, plaintiff hereby moves the Court to compel disclosure of such information and other relevant closely connected information. If the Court decides not to compel discovery from defendant,

then plaintiff, in the alternative, moves the Court to issue a subpoena directed to the National Conference of Bar Examiners and to the Hotel Westin to ascertain the presence and quantity of bar examiners of defendant within the forum state of Illinois for defendant's business purposes.

This Court is empowered to issue such a subpoena under 28 USC 1651 and under authority of AMERICAN LITHOGRAPHIC CO. v. WERCKMEISTER, 221 US 603 (1911) and BETHLEHEM SHIPBUILDING CORP. v. NLRB, 120 F2d 126 (1CA 1941). Plaintiff moves for issuance of a subpoena to NCBE and the Westin Hotel as a last resort. Defendant posesses the required information and refuses to be forthright. Would it be more reasonable to compel defendant to provide such information rather than place a burden on innocent third parties?

DEFENDANT SYSTEMATICALLY AND CONTINUOUSLY TRANSACTS BUSINESS WITHIN ILLINOIS

Plaintiff, while reading the case of STRAUSS V. ALABAMA STATE BAR , 520 F.Supp.

173 (DC ND Alabama, 1981) wherein the residency requirement of the Alabama State Bar was invalidated, plaintiff first learned that it is a standard practice of bar associations to use the National Conference of Bar Examiners, headquartered at 333 North Michigan Avenue, Chicago, Illinois, as an investigative agency in order to obtain information on the character and fitness of out-of-state residents. Defendant has stated that 159 Illinois residents applied for and sat for the bar examination in issue, i.e. July 1980 and this is from Illinois alone, leaving applicants from 48 other states unaccounted for. It is hypothesized that the total number of out-of-state applicants could easily be over one thousand since over 8,000 applicants took the exam in issue.

While reading this case, it occured to plaintiff that defendant quite probably engages in this practice presently and in the past of engaging NCBE to investigate

applicants and pays NCBE a monetary fee of amount unknown to plaintiff. Accordingly, by letter of May 21, 1982, submitted herewith as exhibit "D", plaintiff requested, as he did in the letter of May 17, 1982, that defendant voluntarily provide such information. Defendant has refused plaintiff even the courtesy of replying to the letter of May 21, 1982. Plaintiff attempted by numerous telephone calls to Mr. Robert Sweet, attorney for defendant, on June 1, 1982, to ascertain whether a reply to the letter of May 21, 1982 was forthcoming. However, plaintiff was unable to either speak directly with Mr. Sweet or receive an answer by leaving a message with his secretary for Mr. Sweet to leave a return message with her.

Thus, we have a second refusal to provide information. The systematic and continuous use of the paid for services of NCBE would be another substantial, continuous and systematic contact of defendant with the

forum State of Illinois. This issue was known to defendant and evaded by the Wailes affidavit, further discrediting the affidavit. Accordingly, all issues and arguments presented herein by plaintiff should be viewed in light of such discreditation, i.e. the refusal to divulge, the admission by lack of defendant's denial, and the spoliation inference. Similarly, this Court has the power to issue a subpoena to the National Conference of Bar Examiners to determine such information and facts as an alternative to compelling discovery from defendants.

CONCLUSION

Plaintiff has a right to due process to prove his case and was denied this right in the district court. Even in the granting of the discovery requested herein, plaintiff's discovery is severely limited relative to that which should have been permitted in the district court under Rule 26 FRCP. Accordingly, this court should make all inferences

presented most favorable to plaintiff, and in the alternative, permit plaintiff to take discovery by compelling discovery from either defendant or from third parties which are readily available within the geographic limits of the City of Chicago, Illinois, and certainly within the forum State of Illinois.

Respectively submitted

Frederick A. Wein
Attorney for plaintiffs-
Appellants

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 81-2708
Filed February 18, 1982

(PORTION OF) REPLY BRIEF

PERSONAL JURISDICTION-TRADITIONAL MINIMUM CONTACTS

The district court refused to permit discovery with regard to jurisdictional issues and plaintiff was unable to determine the numbers of members of the State Bar of California having mailing addresses in Illinois. However, defendant, at page 18 of their brief, indicates that 413 members have mailing addresses within Illinois. These members receive the Bar Journal published by defendants and are solicited within the forum State of Illinois by advertisements in that Bar Journal. Just one example of such a solicitation is a solicitation to travel to Montery California for a State Bar Convention. One such advertisement appears in the California Bar Journal of May 1980 at pages 217-221 and solicits attendance

lodging and recreation of bar members within the State of California and for defendant's direct benefit. Undoubtedly, such a solicitation appears every year. A copy of this solicitation is included in the supplemental appendix submitted herewith. Plaintiff hereby moves the court to take judicial notice of such afforementioned advertisement under Rule 201, Federal Rules of Evidence. Such is an active solicitation and not merely a "PASSIVE UNILATERAL" activity.

Such an express solicitation by defendants within the forum State of Illinois provides a substantial contact and, continuous and systematic transaction of business which in itself provides a basis for personal jurisdiction. See Wilkerson v. Fortuna Corporation, 554 F2d 745, (5CA 1977). This solicitation along with other substantial and continuous contacts by defendants as previously shown with the forum State of Illinois provide substantial and continuous

contacts with Illinois to enable assertion of personal jurisdiction over defendants even though the activity is not directly connected with the bar examination complained of. See Perkins v. Benquet Consolidated Mining Co., 342 US 437 (1952), Fissons Limited v. U.S., 458 F2d 1241 (7CA 1972), and BraBand v. Beech Aircraft Corp., 51 Il App.3d 296, 367 NE2d 118 (1972), aff'd 72 Il 2d 548.

Defendant claims various subject matter immunities based upon its purportedly being an agency of the State of California. However, defendant also claims lack of personal jurisdiction over them because they purportedly do no business in the State of Illinois, have no agents here, and have no offices here. This is not true.

As shown hereinabove, defendants themselves do business within the forum State of Illinois. Moreover, the State of California maintains offices in the City of Chicago,

State of Illinois. The court's attention is directed to page 190 of the Chicago alphabetical telephone directory (white pages) published by Illinois Bell Telephone Corp., dated July 1, 1981, a copy of page 190 being included in the supplemental appendix submitted herewith. This directory shows, as indicated in red, that the California State Board of Equalization, an agency of the State of California, has offices at 150 North Wacker Drive, Chicago, Illinois, telephone number 782-7253. Moreover the California State Franchise Tax Board, an agency of the State of California, also has offices at 150 North Wacker Drive, Chicago, Illinois, telephone number 853-6300. In fact, the listing of the Franchise Tax Board is in enlarged typeface and constitutes an advertisement in the directory and in the State of Illinois. Plaintiff hereby moves the court to take judicial notice under Rule 201 Federal Rules of Evidence, of these listings

at page 190 in the July 1981 Chicago Telephone directory and of the existance of said offices within the forum state of Illinois.

A telephone call to these offices reveals that the Board of Equilization handles sales tax matters in connection with the State of California and the Francise Tax Board deals with corporations including corporate tax matters as well as individual income tax matters for the State of California. It seems evident that the State of California derives substantial and continuous revenue from within the State of Illinois through said existing offices in order to justify maintainance of such offices in Illinois.

Defendant claims to be a state agency to cloak it from subject matter jurisdiction. It them must also be a state agency for purposes of personal jurisdiction under the Illinois long-arm statute. Defendant cannot have it both ways. Thus, these offices

of the State of California alone constitute substantial and continous contacts by the State of California and the agencies thereof including defendant with the State of Illinois to exert personal jurisdiction over defendant. See Hutter Northern Trust v. Door County Chamber of Commerce, 403 F2d 481 (7CA 1968).

Under Perkins v. Benquet Consolidated Mining, Co., (supra), Fissons Limited v. U.S. (supra), and Braband v. Beech Aircraft Corp., (supra) it is permissible to exercise personal jurisdiction over defendants even though the cause of action arose from activities entirely distinct from its conduct within the state. Here it is shown that the State of California, of which defendant asserts it is an agency of, conducts systematic and continuous transaction of business within Illinois. Such contacts of the State of California therefore are also contacts by defendants within the forum State of Illinois. . . . . .

SUBJECT MATTER JURISDICTION

Defendant strongly relies upon the fact that traditionally, the states have a compelling interest in the professions within their boundaries which gives them broad power to establish standards for licensing practitioners in regulating the practice of the professions. See Goldbarb v. Virginia State Bar, 421 US 773 (1975). However, as the U.S. Supreme Court has stated in Reynolds v. Sims, 377 US 533 (1964) quoting from Gomillion v. Lightfoot,364 US 339 (1960):

(Citation omitted)

Put another way, a state cannot, under the guise of regulating the legal profession, ignore constitutional rights. N.A.A.C.P. v. Bu-ton,371 US 415 (1963). It is beyond question that bar examiners are subject to the requirements of the Due Process and Equal Protection Clauses of the U.S. Constitution in the conduct of their duties. See Schware v. Board of Examiners,353 US 232 (1957).

As the three-judge court said in Potts v. Honorable Justices of the Supreme Court of Hawaii, 332 F.Supp. 1392 (D.Hawaii 1971) at 1395:

> (Citation omitted citing Keenan v. Bd. of Law Examiners, 317 F.Supp 1350 (E.D.N.C. 1970); Webster v. Wofford 321 F.Supp 1259 (N.D.Ga.1970); Law Students Civil Rights Council, Inc. v. Wadmond, 299 F.Supp.117(S.D.NY 1969), aff'd 401 US 154...and Lipman v. Van Zant, 329 F.Supp. 391 (C.D.N.Miss. 1971) all three-judge courts.)
>
> . . . It is undisiputed that even a court, much less a state bar is not immune from civil rights statutes and that the federal courts have subject matter jurisdiction in such cases. See Supreme Court of Virginia v. Consumers Union,100 S.Ct. 1967 (1980) and the companion case of Consumers Union v. Virginia State Bar, 100 S.Ct. 2980, and the consolidated cases of Feldman v. Garner, and Hickey v. District of Columbia Court of Appeals,661 F2d 1295 (D.Columbia 1981). Moreover, the federal courts have jurisdiction over bar examiners with regard

to anti-trust violation, especially when the practice of grading is challanged, as it is in the present case. See Ronwin v. State Bar of Arizona, 663 F2d 914(9CA 1981).

Defendant claims Eleventh Amendment immunity to damages, contrary to the congressional intent under 42 USC 1985, that damages cannot be ascribed to them because they are an agency of the State of California. However, defendant has not shown that they receive any monies from the State of California treasury or if they receive such monies, the extent of such monies in comparison with other income sources. See Ronwin v. State Bar of Arizona, supra.....

PERSONAL JURISDICTION NATIONWIDE

. . . . Nationwide jurisdiction for federal courts in federal question jurisdiction is well stated in Federal Trade Commission v. Jim Walter Corporation, 651 F2d 251 (5CA 1981) at 256 as follows:

"Subject only to the regulation of

> Congress, each federal court exercises the "Judicial Power of the United States," not a judicial power constitutionally limited by boundaries of a particular district. (citation omitted). Because the district court's jurisdiction is always potentially, and, in this case, actually co-extensive with the boundaries of the United States, due process requires only that a defendant in a federal suit have minimum contacts with the United States, "the sovereign that has created the court", (citation omitted). JWC, a resident United States Corporation, necessarily has sufficient contacts with the United States to satisfy the requirements of due process. See e.g. Fitzsimmons v. Barton, 589 F2d 330 (7th Cir. 1979)."

In accord is Driver v. Helms, 577 F2d 147 (1CA 1978) wherein the court stated at 156:

> "The minimum contacts test was developed in cases testing the limits of a state's jurisdiction over those not found within its boundaries. The circumscription of state court jurisdiction is a product of boundaries of state's sovereignty. The United States, however, whose court is here asserting jurisdiction does not lose its sovereignty when a state's border is crossed. The Constitution does not require the federal districts to follow state boundaries."

The court further states in footnote 25, page 156:

> "We see no reason why the United States does not have the same power over defendants found within its borders. Even if we were to say that minimum contacts had to be established, anyone found and served within the United States would have sufficient contacts with the United States."

. . . .Thus,which manner of service under Rule 4 FRCP is used, has no effect on jurisdiction. As previously stated, defendant confuses process with jurisdiction. In accord, Terry v. Raymond Intern Inc. 658 F2d 398 (5CA 1981) at 401 wherein the court states:

> "Our analysis of personal jurisdiction is based on a combination of two elements, amenability to jurisdiction and service of process. By amenability we refer to the substantive reach of a forum's jurisdiction. Service of process is the physical means by which jurisdiction is asserted. These elements are related but distinct. Both service of process and amenability must be present to authorize a district court to adjudicate the rights of the parties. Because amenability has both state law and federal constitutional significance, personal jurisdiction of the district court over Manitowoc must be determined by the use of three tests: (1) assertion of jurisdiction by the law of the forum, (2) conformity of the law with the Constitution, and

(3) authority for the means of service of process. Under the Federal Rules of Civil Procedure, either federal or state methods of service are authorized. See FRCP 4. If the law of the forum does not authorize the means by which service on a party has been accomplished the court lacks personal jurisdiction over the party even though the party is amenable to the court's jurisdiction.

In a diversity case, the amenability of a nonresident party is determined under a two-part test. First the long-arm statute of the forum state must assert jurisdiction over the defendant for the cause of action at issue in the suit. This question is governed by state law (citations omitted). Second, the exercise of personal jurisdiction over the defendant must be consistant with the due process clause of the fourteenth amendment. This inquiry proceeds under federal law, and consists of deciding whether the defendant has minimum contacts with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" International Shoe Co. v. Washington, 326 US 310...; see also Product Promotions Inc. v. Cousteau, 495 F2d 483...

The contours of amenability in non-diversity cases are more fluid. Federal statutes have effect throughout the United States, and thus assertion of "federal long-arm jurisdiction" arises only in the context of jurisdiction over nonresident aliens or the extraterritorial assertion of American law (citations omitted)."

The court concludes on page 402:

"In a case brought under both diversity and federal case juris-

diction, the defendant's amenability to process under state law, which would be critical in a pure diversity based action, is irrelevant."

In accord is Diver v. Helms, 577 F2d 147 (1CA 1978)wherein the court states at 155:

"The statute addresses only the mechanics of service of process and does not address the exercise of personal jurisdiction. Obviously, it is one thing for an individual to be served with process extraterritorily (sic), but quite another for that individual to be subject to the personal jurisdiction of a court in compliance with the Constitutional requirements of due process.

It is true that jurisdiction over a person and service are distinguishable but they are closely related. (S)ervice of process is the vehicle by which the court may obtain jurisdiction."